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DECISION



V. J. Lopez, GCM
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-164031(1).175

DATE: August 11, 1978

MATTER OF: National Commission on Libraries and
Information Science

- DIGEST: 1. Section 223 of the Higher Education Act of 1965, Title II, Part B, as amended, authorizes the Office of Library and Learning Resources, Office of Education, Department of Health, Education and Welfare, to make grants to and contracts with public and private agencies and institutions. Regulations define "public agency" to exclude Federal agencies. The National Commission on Library and Information Science is an independent agency in the executive branch and therefore is not eligible to receive funds under section 223.
2. The Commissioner of Education has no authority to make an exception from the statutory regulation (45 C.F.R. § 100.1) which defines "public agency" as excluding Federal agencies for purposes of grant or contract awards under section 223 of the Higher Education Act of 1965.

The Executive Director, National Commission on Libraries and Information Science (Commission) has asked for our opinion on the legality of a transfer of funds from the Office of Libraries and Learning Resources (OLLR) in the Office of Education (OE), Department of Health, Education and Welfare (HEW), to the Commission, under the Higher Education Act of 1965.

The Commission was established in 1970 as an independent agency within the executive branch. 20 U.S.C. § 1502 (1976). The Commission has primary responsibility for developing or recommending overall plans, and advising appropriate Federal, State, or local Governments and agencies, to assure that library and information services are adequate to meet the needs of the people of the United States.

The Commission has planned a national conference, as authorized by Pub. L. No. 93-568, December 31, 1974, to develop recommendations concerning national support for library and information networks. OLLR proposed to transfer funds to the Commission for the conference from those available under section 223 of the Higher Education Act of 1965, Title II, Part B, as amended. 20 U.S.C. § 1034 (1976). This section authorizes the Commissioner of Education to make grants or contracts for library research and demonstration projects. It provides:

"(a) The Commissioner [of Education] is authorized to make grants to institutions of higher education and other public or private agencies, institutions, and organizations, for research and demonstration projects relating to the improvement of libraries or the improvement of training in librarianship, including the development of new techniques, systems, and equipment for processing, storing, and distributing information, and for the dissemination of information derived from such research and demonstrations, and, without regard to section 3709 of the Revised Statutes, to provide by contracts with them for the conduct of such activities; except that no such grant may be made to a private agency, organization, or institution other than a nonprofit one."

An opinion by the Adult and Vocational Education Branch, Office of General Counsel, HEW, that section 223 funds may not be transferred by grant or contract to the Commission, has prevented the transfer of funds. The Executive Director disagrees with this and asks for our opinion and views on whether OLLR can legally execute a contract or an interagency transfer of funds with the Commission, using Title II funds, for a Conference on National Networks.

The Executive Director argues that the term "public agency" includes Federal agencies. The statute does not define "public agencies," and the legislative history does not discuss the meaning of the term. However, in regulations applicable to the section 223 program (45 C.F.R. § 100.1 (1976)), "public agency" is defined as:

"a legally constituted organization of government under public administrative control and direction, but does not include agencies of the Federal Government." (Emphasis added.)

The Commission, as an independent Federal agency, is therefore not eligible for assistance under section 223 of the Higher Education Act of 1965. Indeed, we have serious doubt whether a regulatory decision to define "public agency" to include Federal agencies would be a permissible interpretation of section 223. In any event, the interpretation adopted by OE is consistent with the statutory language and neither arbitrary nor unreasonable on its face; it will therefore not be questioned by this Office.

In this connection, the staff of the Commission has asked if there is any basis for the Commissioner of Education to make an exception to the exclusion of Federal agencies from eligibility for section 223 grants. Without express statutory authority to do so, an agency may not waive a statutory regulation. We are not aware of any authority vested in the Commissioner of Education to make such a waiver.

The Executive Director of the Commission says that OE has made transfers to other Federal agencies. In the interest of complying with the Commission's request that we answer as quickly as possible, we have not attempted to verify that allegation. However, our answer to this question would not be different if OE had made such transfers. Under 45 C.F.R. § 100.1, OE cannot properly transfer section 223 funds to any Federal agency.

Finally, in response to HEW's questioning of the legal authority of the Commission to accept funds from a Federal agency, the Executive Director points out that the Commission is authorized by 20 U.S.C. § 1505(b) to contract with Federal agencies to carry out any of its functions, and that it has not only let contracts to other Federal agencies but has, since its inception, also accepted contracts from them. We do not question the right of OE, using funds other than those appropriated for purposes of section 223 of the Higher Education Act of 1965 to contract with the Commission, nor the right of the Commission to accept a contract from OE, for the performance by the Commission of a service for OE, under the Economy Act, 31 U.S.C. § 686 (1970). As HEW points out, OE may have some funds available for the same purposes to be served by the proposed Networks Conference and could therefore, under the Economy Act, enter into an agreement with the Commission for it to perform services for OE for such purposes (assuming the Commission were in a position to do so). In such circumstances, the services provided to OE by the Commission might incidentally further the purposes of the Commission.

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With regard to 20 U.S.C. § 1505(b), while that section does give the Commission authority to contract with Federal agencies, such contracts must be to carry out Commission functions. That being the case, we do not see how OE could transfer funds or award a grant or contract to the Commission under section 1505(b), since OE funds would not be available to carry out Commission functions. For the Commission to receive funds from another agency to carry out functions for which it receives appropriations would be an improper augmentation of its appropriations.

In any event, neither the Economy Act nor 20 U.S.C. § 1505(b) gives OE authority to use section 223 funds to make a grant to or contract with the Commission because, as noted above, the Commission is not a "public agency" within the meaning of that section.


Acting Comptroller General
of the United States